UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-HC-2045-BO

UNITED STATES OF AMERICA, Petitioner, v. ANTON JOHNSON, Respondent.	)	MOTION FOR SANCTIONS

The United States hereby files this motion for sanctions under Rule 37(d), and seeks the remedies set forth below. In support, the United States says the following:

On October 17, 2011, the United States filed a motion to compel the Respondent to participate in a deposition, along with a memorandum in support (D.E. 87 and 88). On October 20, Respondent filed a Response (D.E. 89). On October 24, the United States filed a Reply (D.E. 90). It does not appear that the Court has ruled on that motion. If the Court had granted that motion within 30 days of all briefing being done, then the parties could have scheduled depositions in sufficient time to conduct the deposition, get the deposition transcribed, and have the United States' experts review the deposition prior to the trial date, which is set for January 25, 2012. However, at this point, if the Court were to grant the motion, the undersigned would not have sufficient time to take

these steps in time to prepare for trial.[1]

In the motion to compel the Respondent to participate in a deposition, the United States indicated that if Mr. Johnson did not participate in the deposition that it reserved the right to seek additional remedies, including directing that certain facts be taken as established, prohibiting the Respondent from introducing certain evidence (including the testimony or report of Dr. Plaud and/or of the Respondent), staying the proceedings until he complies, drawing adverse inferences because of his refusal to answer, ordering costs to be assessed against the Respondent, and/or treating his refusal to comply as contempt of court, under Rule 37(b)(2)(A) and Rule 37(d)(2) of the Federal Rules of Civil Procedure. (See Footnote 6 of D.E. 88 and paragraphs 8 and 10 of D.E. 90).

After the motion to compel was filed and completely briefed, Respondent filed a motion asking for appointment of a second examiner, filed on November 4 and 6, 2011 (D.E. 92 and 93). The United States responded on November 7 (D.E. 94). The United States indicated that it did not object to the appointment of a second

[1]The undersigned has eleven (11) depositions scheduled in Adam Walsh cases in the ten (10) business days between January 3-17. The undersigned also has three, and possibly four Adam Walsh trials scheduled between January 17-23 (Matherly is scheduled before Judge Friedman during the week of January 17, and the Arrington case may also be tried that week; Hass is scheduled before Judge Britt on January 23; and Heyer is scheduled before this Court, also on January 23. The undersigned is attempting to reschedule the Hass trial, if necessary.

examiner, as long as his report was delivered to the United States by December 12, 2011 (in order to give the undersigned time to adequately review it and prepare for trial). The Court granted that motion on December 23, 2011. The undersigned has been informed by counsel for the Respondent that Dr. Wood intends to interview Mr. Johnson on or about December 29, 2011, and counsel expects his report to be completed approximately 10 days later. Therefore, his report is not expected to be received until approximately January 9, 2012 – 2 weeks prior to the trial, and four weeks after December 12, 2011 (the date the government said it must have the report in order to adequately prepare for trial). At this point, the United States does not have adequate time to review it, send it to its experts for review, decide whether to depose Dr. Wood or not, schedule the deposition, take the deposition, get the transcript of the deposition back from the court reporter, send a copy of the transcript to the Government's expert for review and prepare for trial, especially given the heavy deposition and trial schedule set forth in footnote 1 of this memorandum. Such a schedule also violates both the Rules of Civil Procedure (which generally requires expert witness reports to be delivered 90 days prior to trial – see Rule 26(a)(2)(D)), and the August 4, 2010 Standing Order of the Court as well as the November 14, 2011 Standing Order of the Court (both of which provide for a 50-60 day discovery period after the delivery of the last report by

Respondent's chosen examiner).

It is now less than 30 days prior to trial. Mr. Johnson has continued to refuse to be deposed, and this Court has not compelled him to do so. Despite the fact that he has refused to be interviewed by the Government's experts, and has refused to submit to a deposition by the Government, he has spoken to or will speak to his chosen examiners (Dr. Plaud and Dr. Wood). Furthermore, Respondent's counsel has indicated that he does not expect to deliver Dr. Wood's expert report until approximately 2 weeks prior to trial. Therefore, the United States seeks the following relief, pursuant to Rule 37(d)(3) and Rule 37(b)(2)(A):

1. That the Court prohibit Mr. Johnson from testifying in his own behalf at trial.

2. That the Court strike the testimony and reports of Dr. Plaud and Dr. Wood, since they will have formed their opinion based on an interview of Mr. Johnson (even though Mr. Johnson refused to be interviewed by the Government's experts or be deposed).

3. That the Court declare and accept as true any prior statements made by Mr. Johnson that the Government propounds at trial, provided such statements are contained in the disclosures produced to the Respondent by the Government.

4. That the Court draw adverse inferences from Mr. Johnson's refusal to testify at deposition.

In the alternative, the United States suggests that the

following alternative remedies could cure the prejudice to the Government from the discovery violations by the Respondent:

1. That the Court grant the Government's motion to compel (D.E. 87); and

2. That the Court continue the trial until at least 50-60 days after the delivery of Dr. Wood's report; and

3. That if Mr. Johnson continues to refuse to participate in a deposition after the Court orders him to do so, that the Court grant the primary relief requested above.

Without such relief, the United States will be denied substantive and procedural rights provided under the Rules of Civil Procedure and the Standing Orders of this Court, and will be severely prejudiced in its ability to prepare for trial. It is fundamentally unfair for the Respondent to talk freely with his own experts and to testify at trial, without submitting himself to a deposition as provided for in the Rules.

The undersigned certifies, pursuant to Rule 37(d)(1)(B) that he has attempted in good faith to resolve the issue and obtain a voluntary deposition of the Respondent without need for Court action; but the parties have been unable to agree on a resolution. Counsel for Respondent has indicated that he personally does not oppose a reasonable continuance of the trial, but does not believe he can consent to it without permission from his client, and he has not been able to consult with his client about it. Therefore, the

United States asks the Court to grant the relief set out above.

Respectfully submitted this 28th day of December, 2011.

THOMAS G. WALKER
United States Attorney

BY: /S/ G. Norman Acker, III
G. NORMAN ACKER, III
Assistant United States Attorney
Civil Division
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Facsimile: (919) 856-4821
E-mail: Norman.Acker@usdoj.gov
N.C. Bar No. 12839
Attorney for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served upon Lawrence Brenner, counsel for the respondent, by electronically filing the foregoing with the Clerk of Court this date, December 28, 2011, using the CM/ECF system which will send notification of such filing above.

/S/ G. Norman Acker, III
G. NORMAN ACKER, III
Assistant United States Attorney
Civil Division
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Facsimile: (919) 856-4821
E-mail: Norman.Acker@usdoj.gov
N.C. Bar No. 12839
Attorney for Petitioner